

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

MICHAEL C. TIERNEY,

Petitioner,

vs.

JOHN KASICH, Governor,

Respondent.

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CASE NO. 1:11-CV-01978

OPINION & ORDER

[Resolving Docs. [39](#), [41](#), [42](#), [46](#), [47](#), [48](#), [50](#),
and [51](#)]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Petitioner Michael C. Tierney filed his *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254.^{1/} Respondent says the petition should be dismissed for lack of jurisdiction.^{2/} Before the Court is Magistrate Judge Baughman’s Report and Recommendation recommending that the Court dismiss Tierney’s petition in its entirety.^{3/} For the reasons stated below, the Court **ADOPTS** the Report and Recommendation and **DISMISSES WITH PREJUDICE** the petition.^{4/}

To invoke a federal district court's jurisdiction to review a petition for a writ of habeas corpus, a petitioner must be “a person *in custody* pursuant to the judgment of a State court ... in violation of the Constitution or laws or treaties of the United States.”^{5/} The petitioner must be *in custody* under the conviction or sentence at issue at the time the habeas petition was filed.^{6/} A petitioner is not *in custody* after the petitioner’s sentence has been fully discharged merely because

^{1/}Doc. [1](#).

^{2/}Doc. [12](#).

^{3/}Doc. [47](#).

^{4/}Because Petitioner Tierney’s petition is dismissed with prejudice, his motions for appointment of counsel, motion for copies of the entire record, and motions to amend the complaint are moot.

^{5/}[28 U.S.C. § 2254\(a\)](#) (emphasis added).

^{6/}[Maleng v. Cook](#), 490 U.S. 488, 491 (1989).

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the prior conviction was used to enhance the sentence imposed for a subsequent crime.^{7/}

In 2000, Petitioner Tierney was convicted in Ohio state court for theft, safecracking, and breaking and entering. He was sentenced to 30 months.^{8/} After his direct appeal, on June 13, 2002, Tierney was re-sentenced to 17 months.^{9/} As a result of his shorter sentence and credit for time served, Tierney was released subject to any outstanding warrants or orders from the parole board.^{10/} On September 20, 2011, Petitioner Tierney filed his *pro se* petition for habeas corpus under 18 U.S.C. § 2254 challenging his 2000 conviction because that conviction enhanced the sentence he received in Florida.^{11/}

Thus, Tierney was not “in custody” at the time of filing the instant petition for purposes of federal habeas corpus under 28 U.S.C. § 2254(a) for either the 2000 original judgment of conviction or the 2002 re-sentencing judgment of conviction. Accordingly, the petition should be dismissed

The Court notes that Petitioner Tierney’s reliance on *Lackawanna County. Dist. Attorney v. Coss* is misplaced.^{12/} In this case, the Supreme Court held a prisoner is “in custody” for habeas jurisdiction when a § 2254 petition asserts a challenge to a *present* sentence that was enhanced by an allegedly invalid prior conviction.^{13/} Here Petitioner Tierney does not challenge his *present* sentence. Rather he challenges his *past* sentence imposed in 2000. Thus, this case is inapplicable.

For the foregoing reasons, the Court **OVERRULES** Petitioner’s objections, **ADOPTS** the

^{7/}*Id.* at 492.

^{8/}Doc. [1](#).

^{9/}Doc. [12](#) at 6.

^{10/}“Respondent was unable to locate any period of parole supervision stemming from Tierney’s 2002 re-sentencing. Even if there were a period of parole supervision from that judgment of conviction, such supervision period could not exceed a period of 5-years. Thus, any period of parole supervision would have expired in 2007, well-before the filing of the instant habeas petition.” *Id.* n. 3 (internal citation omitted).

^{11/}Doc. [1](#).

^{12/}[Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394 \(2001\).](#)

^{13/}*Id.*

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recommendations of Magistrate Judge Baughman, and **DISMISSES WITH PREJUDICE** the petition. The Court certifies, pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#), that an appeal from this decision could not be taken in good faith, and no basis exists upon which to issue a certificate of appealability.^{14/}

IT IS SO ORDERED

Dated: April 2, 2014

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

^{14/}[28 U.S.C. § 2253\(c\); Fed. R. App. P. 22\(b\)](#).